Public Prosecutor v Raja Pandian

HIGH COURT (TAIPING) — CRIMINAL REVISION NO 43-6-93
ABDUL MALIK ISHAK JC
20 APRIL 1993

Criminal Procedure — *Preliminary inquiry — Powers and duties of the presiding magistrate — Options open to the magistrate in a preliminary inquiry— Criminal Procedure Code (FMS Cap 6) ss 139, 140, 141, 142 & 143*

Criminal Procedure — *Preliminary inquiry — Whether proper for magistrate to amend charge and transfer case to sessions court — Penal Code (FMS Cap 45) ss 302 & 304*

Words and Phrases — *'Sufficient grounds for committing' — Criminal Procedure Code (FMS Cap 6) s 140(i)*

The accused was charged in the magistrates' court for an offence of murder under s 302 of the Penal Code (FMS Cap 45) ('the Code') and a preliminary inquiry was held. At the end of the preliminary inquiry, the magistrate amended the charge from s 302 of the Code to one of culpable homicide under s 304 and directed the case to be tried before the sessions court. The public prosecutor being dissatisfied with the magistrates' court, applied for a revision to the High Court.

Held, dismissing the application:

(1) At the end of the prosecution's case in a preliminary inquiry, the magistrate has four options open to him. Firstly, he may discharge the accused if there are not sufficient grounds for committing him to the High Court, the discharge being one that does not amount to an acquittal and the prosecution can charge the accused again through another preliminary inquiry before another magistrate. Secondly, if the magistrate feels the accused should be tried before himself he must frame a charge or charges in writing and call the accused to plead thereto. The summary trial procedure must be followed if this option is taken. Thirdly, if the offence committed is one outside the magistrate's territorial jurisdiction he may order the accused to be tried before another magistrate or if it is beyond his penal jurisdiction then by virtue of s 100 of the Subordinate Courts Act 1948, before a sessions judge. Lastly, if the magistrate finds sufficient grounds to commit the accused he should frame a charge under his hand and commit the accused to the High Court. The magistrate in doing so may depart from the wording of the original charge submitted by the prosecution as it is only a tentative one. There is no right of appeal against the order of committal made by the magistrate.

(2) The magistrate in a preliminary inquiry has an unfettered discretion in deciding which option to adopt and should be bold and

A independent and should decide for himself which option to take according to the evidence. The law gives them magistrate a free hand to decide according to the evidence.

(3) Sufficient grounds for committing means evidence which is not inherently improbable for the magistrate to believe. He ought to B commit when the evidence of credible witnesses if believed would sustain a conviction.

(4) In a preliminary inquiry, the magistrate must record every detail that transpired on a separate sheet of paper which is considered the notes of evidence and is separate from the deposition of witnesses which are recorded in Form 149. It is also the duty of C the magistrate to decide on the admissibility of a cautioned statement.

(5) Based on the evidence in this case, the magistrate was correct in amending the charge to one under s 304 of the Code and had the power to transfer the case to the sessions court.

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[Bahasa Malaysia summary

Si tertuduh telah didakwa di mahkamah majistret atas satu kesalahan membunuh di bawah s 302 Kanun Keseksaan (FMS Bab 45) ('Kanun itu') dan siasatan permulaan telah diadakan. Pada penghujung siasatan E permulaan itu, majistret telah meminda tuduhan di bawah s 302 Kanun itu kepada tuduhan homisid salah di bawah s 304 dan telah mengarahkan supaya kes itu didengar di hadapan mahkamah sesyen. Pendakwa raya telah memohon kepada Mahkamah Tinggi untuk suatu penyemakan kerana tidak berpuas hati dengan arahan mahkamah majistret itu.

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Diputuskan, menolak permohonan itu:

(1) Pada penghujung kes pendakwa dalam suatu siasatan awal, majistret mempunyai empat pilihan. Pertama, beliau boleh melepaskan si tertuduh jika tidak ada alasan yang cukup untuk G menghukum si tertuduh dibicarakan di Mahkamah Tinggi, dan pelepasan ini tidak bererti bahawa si tertuduh dibebaskan dan pendakwa boleh mendakwa si tertuduh semula melalui siasatan permulaan yang lain di hadapan majistret yang lain. Kedua, jika majistret mendapati bahawa si tertuduh harus dibicarakan di hadapannya, beliau mestilah merangka pertuduhan yang bertulis H dan memanggil si tertuduh untuk menjawabnya. Prosedur guaman terus haruslah diikuti di sini. Ketiga, jika kesalahan itu dilakukan di luar bidang kuasa wilayah majistret itu, beliau boleh mengarahkan supaya si tertuduh dibicarakan di hadapan majistret lain atau jika kesalahan itu melampaui bidang kuasa hukuman I beliau, menurut s 100 Akta Mahkamah Rendah 1948, di hadapan hakim sesyen. Akhirnya, jika terdapat alasan yang memadai majistret mestilah merangka tuduhan dan menghukum tertuduh ke Mahkamah Tinggi. Majistret boleh menyusun semula perkataan

tuduhan asal yang dikemukakan oleh pihak pendakwa kerana tuduhan asal itu adalah tuduhan sementaraan sahaja. Tidak ada hak merayu terhadap perintah majistret itu.

(2) Majistret mempunyai bidang kuasa yang tidak terbatas dalam suatu siasatan permulaan apabila membuat pilihan dan haruslah berani serta bebas dan sepatutnya membuat keputusan secara tersendiri mengikut keterangan yang dikemukakan. Undang-undang memberikan kebebasan yang penuh kepada seseorang majistret untuk membuat keputusan berdasarkan keterangan.

(3) Alasan yang mencukupi untuk menghukum si tertuduh bererti bahawa terdapat keterangan yang tidak secara sendirinya sukar untuk dipercayai. Majistret hendaklah menghukum si tertuduh jika keterangan saksi-saksi yang boleh dipercayai boleh menyebabkan si tertuduh disabit jika keterangan itu diterima.

(4) Di dalam satu siasatan permulaan, seseorang majistret mesti merekodkan setiap butiran yang berlaku di atas kertas yang berasingan yang dikenali sebagai nota keterangan dan ia berasingan daripada deposisi saksi-saksi yang direkodkan dalam Borang 149. Juga menjadi tanggungjawab majistret untuk membuat keputusan tentang kebolehterimaan pernyataan beramaran.

(5) Berdasarkan keterangan di dalam kes ini, majistret telah membuat keputusan yang betul apabila beliau meminda tuduhan kepada satu di bawah s 304 Kanun itu dan beliau memang mempunyai kuasa untuk memindah kes ini ke mahkamah sesyen.]

Notes

For cases on preliminary inquiry, see 5 *Mallal's Digest* (4th Ed) paras 1809–1836.

Cases referred to

1 *Voon Chin Fatt v PP* [1948–49] MLJ Supp 131 (refd)
2 *Lian Boon Khiam & Ors v R* [1962] MLJ 18 (refd)
3 *Mary Shim v PP* [1962] MLJ 132 (refd)
4 *Theopillai v PP* [1956] MLJ 177 (refd)
5 *Re Low Kuan Meng* [1962] MLJ 265 (refd)
6 *Indran & Anor v PP* [1985] 2 MLJ 408 (refd)
7 *PP v Tan Choon Ang* [1990] 1 MLJ 367 (refd)
8 *Re Osman bin Abdullah* [1954] MLJ 237 (refd)
9 *In re Pang Po Pah* [1985] 2 MLJ 214 (refd)
10 *Kang Yeong Siew v PP* [1928] 6 FMSLR 139 (refd)
11 *Re Chow Kim Lin* [1963] MLJ 130 (refd)
12 *PP v Ng Goh Weng & Anor* [1979] 1 MLJ 127 (refd)
13 *Lim Yow Choon v PP* [1972] 1 MLJ 205 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 139, 140, 141, 142, 143

Yong Zarida bte Sazali (Deputy Public Prosecutor) for the public prosecutor.

Gurbachan Singh (Bachan & Kartar) for the accused.

Abdul Malik Ishak JC: The accused, one Raja Pandian s/o Arunachala Pandaham, was charged in the Magistrate's Court, Kuala Kangsar for an offence under s 302 of the Penal Code (FMS Cap 45) ('the Code') for the murder of Subramaniam s/o Ponnusamy on 7 May 1988 at about 8pm, in front of house no 344 Kampong Che'gu Yahya, Kuala Kangsar, Perak. At the close of the preliminary inquiry, the learned magistrate took a bold step and amended the said charge to one under s 304 of the Code and accordingly directed that the accused be tried before the sessions court and in the process made an order of the transfer of the case to the Sessions Court, Kuala Kangsar.

Cik Yong Zarida bte Sazali, the learned deputy public prosecutor, urged this court (in her usual candour) to exercise its revisionary powers to set aside the order made by the learned magistrate on the ground that the learned magistrate had erred in law in not committing the accused to the High Court for trial as there are sufficient grounds to commit the accused for an offence under s 302 of the Code and to direct the learned magistrate accordingly.

As a general rule, all murder trials before the High Court must be preceded by a preliminary inquiry. Chapter XVII of the Criminal Procedure Code (FMS Cap 6) ('the CPC') sets out in great detail the relevant powers of the magistrate in a preliminary inquiry. Incidentally, Ch XVII of the CPC mentions the magistrate as being the officer responsible for conducting the preliminary inquiry. However, it is pertinent to note that by virtue of s 100 of the Subordinate Courts Act 1948, the presidents of the sessions courts (now judges) may also conduct preliminary inquiries. Now, for the purpose of this revision, the relevant powers of a magistrate in a preliminary inquiry are governed by s s 139, 140, 141, 142 and 143 of the CPC which are reproduced below:

> 139 (i) When the accused person is brought before him the Magistrate shall proceed to hear the case for the prosecution and to take all such evidence as may be produced in support thereof and such other evidence as the Magistrate may think fit to call for.
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> (ii) Nothing in this section shall prevent evidence being produced in support of the prosecution or called for by the Magistrate at any stage of the proceedings provided that an opportunity is given to the accused to cross-examine and to answer and rebut such evidence.
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> (iii) If the Magistrate calls for other evidence than that produced in the case for the prosecution he must record the fact on the depositions stating shortly the nature of the evidence he has called for.
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> 140 (i) When the evidence referred to in the last preceding section has been taken the Magistrate shall if he finds that there are not sufficient grounds for committing the accused person for trial discharge him, unless it appears to the Magistrate that such person should be tried before himself or before some other Magistrate in which case he shall either—

(a) forthwith frame a charge or charges in writing and call upon the accused to plead there to; or
(b) order the accused to be tried before some other Magistrate.

(ii) If the Magistrate takes action under paragraph (a) of subsection (1) the case shall proceed as a summary trial, provided that—

(1) it shall not be necessary for the Magistrate to recall and re-examine the witnesses for the prosecution;
(2) the accused may require that any witness called for the prosecution may be recalled for further cross-examination.

(iv) When the Magistrate is of opinion that there are peculiar difficulties or circumstances connected with the case or whenever he shall be so directed by the Public Prosecutor he shall remand the accused or admit him to bail and shall forthwith transmit the depositions to the Public Prosecutor in order that he may give such instructions as to him shall appear requisite.

141 (i) If after taking the evidence for the prosecution the Magistrate is of opinion that on the evidence as it stands there are sufficient grounds for committing the accused for trial he shall frame a charge under his hand declaring with what offence or offences the accused is charged.

142 (i) If the accused elects to reserve his defence he shall forthwith be committed for trial before the High Court.

(ii) If the accused elects to make his defence before the Magistrate the statement made by the accused, if any, shall be taken down in writing and read over to him and shall be signed by such Magistrate and kept with the depositions and transmitted with them as hereinafter mentioned.

143 When the evidence referred to in the last preceding section has been taken the Magistrate shall—

(a) if he finds that there are not sufficient grounds for committing him for trial discharge the accused;
(b) if he finds that there are sufficient grounds for committing him for trial commit the accused for trial before the High Court.

It is useful to note that in a preliminary inquiry the charge against an accused person is only tentative in nature. This tentative charge serves as a good guide for the evidence to be led by the prosecution and for the accused person to know of the offence of which he is alleged to have committed. In *Voon Chin Fatt v PP*[1] Spenser Wilkinson J, inter alia, said:

> Although under the provisions of the Criminal Procedure Code (s 141) it is only at the conclusion of a preliminary inquiry that the court has to frame a charge it is the practice for the prosecution to put forward charges at the commencement of the enquiry in order that the evidence led may be properly directed to the offence which it is alleged the accused has committed.

The prosecuting officer may forthwith, in the course of a preliminary inquiry, produce his evidence by calling witnesses. It is then incumbent on the presiding magistrate or the presiding sessions court judge (as the case may be) to proceed to hear the evidence for the prosecution and to take and record all such evidence as may be produced in support thereof by the prosecution. It is pertinent to point out that the presiding magistrate is not barred and may if he thinks fit call for such other evidence. The accused in

turn must be given the opportunity to cross-examine and to answer and rebut such evidence (see s 139(ii) of the CPC). If the presiding magistrate calls for evidence other than that produced in the case for the prosecution he must record that fact on the depositions stating briefly the nature of the evidence he has called for (see s 139(iii) of the CPC).

At the end of the prosecution's case (in the preliminary inquiry) after hearing comments by the accused or his advocate as provided for under s 151(i)(b) of the CPC, the presiding magistrate has four options open to him depending, of course, on the circumstances of the case. Firstly, if the presiding magistrate finds that there are not *sufficient grounds* for committing the accused person for trial, *discharge him*. The discharge as envisaged in ss 140(i) and 143(a) of the CPC legally speaking does not and cannot amount to an acquittal and therefore the prosecution can charge the accused again in another preliminary inquiry for the same offence. In *Lian Boon Khiam & Ors v R*,[2] Rose CJ, inter alia, said:

> It is no doubt the case that in summary trials before a magistrate or in prosecution before an assize court or a district court a discretion is vested in the court as to whether to record an order of discharge or one of acquittal. Moreover it is the general practice, which has been approved in more than one judicial decision in the courts of the Federation and in Singapore, to record an order of acquittal in such a case unless there are special circumstances favouring the alternative course. As regards, however, matters which come before a magistrate by way of a preliminary inquiry it would seem that the legislature has vested in the magistrate no such discretion. [See the headnotes where it was reported as follows: In matters which come before a magistrate by way of preliminary inquiry, s 139(1) of the Criminal Procedure Code [equivalent to our s 140(i) of the CPC] leaves him with no discretion but record an order of discharge whenever he finds that there are not sufficient grounds for committing the accused for trial. Such an order of discharge cannot be revised by the High Court so as to substitute an order of acquittal in its place.]

Hill JA in *Mary Shim v PP*,[3] inter alia, said:

> It appears to us that this decision [a second preliminary inquiry was commenced after the accused was discharged] in the circumstances of this case was a right and proper one in the interests of the administration of justice, a decision that was in the power of the Attorney-General to make.

The appellant in *Theopillai v PP*[4] was brought before the Magistrate's Court, Ipoh, on a preliminary enquiry into certain charges involving official corruption. At the conclusion of the case for the prosecution the learned magistrate found that there were not sufficient grounds for committing the appellant for trial and discharged him. On 20 January 1956, the public prosecutor called for the proceedings under s 385 of the CPC, and on 9 February 1956, gave instructions under s 386 of the CPC instructing the magistrate: '... to re-open the preliminary enquiry against Theopillai and to conduct and conclude the same by committing the said Theopillai for trial before the court of a judge sitting in the High Court, Ipoh...' The appellant was arrested and brought before the magistrate. On the request before the court, the proceedings were adjourned, and the matter was brought before the High Court. The learned judge then heard arguments and made the

following order: 'That the magistrate, Ipoh, do not proceed in accordance with the instructions of the public prosecutor herein dated 9 February 1956.' By way of a reference to the Court of Appeal under s 34 of the Courts Ordinance 1948, Mathew CJ delivering the judgment of the Court of Appeal said:

> It is not for us to say what instructions may properly be given on a preliminary enquiry that has been concluded by the discharge of an accused person. Had it been the intention of the legislature to give the public prosecutor the power to direct a magistrate to reverse his order of discharge and commit the accused for trial, this power would have been expressed in plain and clear language. Why, indeed, should the public prosecutor be given this unusual power, when he has an appropriate remedy in that he can order the holding of another preliminary enquiry before another magistrate?

In *Re Low Kuan Meng*,[5] Ong J had this to say:

> The order of acquittal was manifestly wrong. A preliminary inquiry is not a trial, and at its conclusion there is no delivery of judgment. In making an order of acquittal the learned magistrate was pronouncing a judgment, and he was purporting to do so even in a matter which he had clearly no jurisdiction to try. The provisions of s 140 are quite clear. 'Discharge' is not synonymous with 'acquittal'.

The sum total of these judgments would show that if an accused person is discharged by the presiding magistrate in a preliminary inquiry, the public prosecutor should order a fresh inquiry before another magistrate.

Section 140(i) of the CPC uses the phrase 'sufficient grounds for committing'. There is a dearth of reported cases on the meaning of this phrase. In *Indran & Anor v PP*,[6] Peh Swee Chin J (as he then was), inter alia, said that: 'the words, viz "sufficient grounds for committing the accused for trial" mean in my view that there is credible evidence, which, if believed, subject to all possible lines of defence, may result in a conviction. Credible evidence, in this context, does not mean evidence of a witness whose credibility has been established, but means, instead, evidence which is not inherently improbable not for example, that incredible story of a witness seeing a cow jump across the moon.' In *PP v Tan Choon Ang*,[7] Haidar J, speaking for the bench in the same vein said: 'By sufficient evidence, it would, in my view, mean that the evidence must necessarily be credible evidence.'

On the other hand, some of the reported cases have affixed the label of prima facie case to the phrase in question. For instance, to name but a few, see *Re Osman bin Abdullah*[8] and *In Re Pang Po Pah*.[9]

Secondly, if the presiding magistrate feels that the accused person should be tried before himself, he shall forthwith frame a charge or charges in writing and call upon the accused to plead thereto (see s 140(i)(a) of the CPC). If this option is adopted, the presiding magistrate must follow strictly the summary trial procedure.

Thirdly, if the offence is outside the jurisdiction of the presiding magistrate he may then order the accused to be tried before some other magistrate (see s 140(i)(b) of the CPC). It is pertinent to note that the presiding magistrate is not barred from transferring the case to the president (now judge) of the

A sessions court (see s 100 of the Subordinate Courts Act 1948 and *In Re Pang Po Pah*[9]). Thus, if the offence cannot be tried by the presiding magistrate he can legally transfer the case to be tried by the judge of the sessions court.

Fourthly, if the presiding magistrate feels that after recording the evidence for the prosecution there are sufficient grounds for committing the accused person for trial he shall frame a charge under his hand and commit the accused for trial (see ss 141(i) and 143(b) of the CPC). Framing of a charge or charges on any offence triable by the High Court would necessarily be for the purpose of committal. *In Re Pang Po Pah*,[9] Wan Yahya J (as he then was) was of the view that in framing a charge or charges for the purpose of committal to the High Court, the presiding magistrate may depart from the tentative charge as submitted by the prosecution. This is what his Lordship said [at p 216]:

> It is obvious from the above that the tentative charge usually submitted before the commencement of a preliminary enquiry is not a formal charge but merely an accusation of a probable offence and as such is not legally binding on the scope or extent of the examining magistrate's enquiry.

It is trite law that no appeal lies against an order of committal by a presiding magistrate in a preliminary inquiry (see *Kang Yeong Siew v PP*[10]). It is also salutary to remember that in a preliminary inquiry a magistrate ought to commit when the evidence of credible witnesses which if believed would sustain a conviction (see *Re Chow Kim Lin*[11]).

In my judgment, the presiding magistrate in a preliminary inquiry has an unfettered discretion in deciding which option to adopt. The presiding magistrate has a judicial duty to perform and is duty bound to either *discharge an accused person for want of sufficient grounds or to try the accused person by himself or to transfer the case to another magistrate which includes the judge of the sessions court or because of sufficient grounds to commit the accused person for trial in the High Court on a charge worded differently from the tentative charge as submitted by the prosecution.* The presiding magistrate in a preliminary inquiry should be bold and independent and decide for himself which option to adopt according, of course, to the evidence as may be produced in support thereof. The presiding magistrate in a preliminary inquiry should stop behaving like a robot and should stop committing all cases to the High Court without ascertaining whether there are sufficient grounds for committing the accused person for trial. Sections 140(i)(a) and (b), 141(i) and 143(a) and (b) of the CPC in clear and unambiguous words give the presiding magistrate a free hand to decide for himself the right option to adopt according to the evidence produced thereof. It is pointless to have these statutory provisions unless legal effect be given to them.

Reverting back to the phrase 'sufficient grounds for committing' as discussed earlier, in my judgment such phrase would refer to that evidence which is not inherently improbable for the presiding magistrate in a preliminary inquiry to believe.

In this revision the question to ask is this: Has the prosecution adduced evidence warranting sufficient grounds for the presiding magistrate to invoke s 143(b) of the CPC, that is, to commit the accused for trial before the High

Court? The learned deputy strenuously argued that there are sufficient grounds to commit the accused to the High Court under s 302 of the Code. A

Another question to ask is this: Was the presiding magistrate right in exercising her powers under s 140(i)(b) of the CPC, that is, transferring the case under s 304 of the Code to be tried by the judge of the sessions court at Kuala Kangsar? With equal force, the learned counsel argued that the presiding magistrate rightly took the course which she took. B

Before exercising my revisionary powers, I have to appraise the evidence as adduced before the presiding magistrate in the preliminary inquiry. The best method to do this is to examine with a toothcomb the record of the proceedings of the preliminary inquiry in order to satisfy myself whether the presiding magistrate had made the right order. C

At the outset, I must at once say that the preliminary inquiry was badly conducted by the prosecution. The prosecution should assist the presiding magistrate in a preliminary inquiry by providing evidence which is not inherently improbable so as to constitute 'sufficient grounds' for the accused to be committed for the offence of murder to the High Court. Though the cautioned statement was tendered by the prosecution and marked as exh P34, yet the record of the proceedings do not reflect this. Again nowhere is it recorded in the record of the proceedings as to whether the cautioned statement of the accused was admitted voluntarily without there being a trial within a trial to determine its admissibility. The presiding magistrate ought to have recorded painstakingly every detail that transpired in the preliminary inquiry on a separate sheet of paper which is considered as the notes of evidence separate from the deposition of witnesses which are normally recorded in the standard court's form no 149. At any rate, it is pertinent to point out that it is the duty of the presiding magistrate in law in a preliminary inquiry to decide on the admissibility of the cautioned statement (see the decision of Suffian LP (as he then was) in *PP v Ng Goh Weng & Anor*[12]). Fortunately, Mr Gurbachan Singh, learned counsel for the accused in the preliminary inquiry and who appeared in this revision, informed the court that the cautioned statement was admitted at the behest of the prosecution without any objection from the defence and accordingly, the cautioned statement was marked as exh P34 without the need of a trial within a trial. D E F G

Now, as the cautioned statement was part of the evidence for the prosecution (*Lim Yow Choon v PP*[13]) the presiding magistrate is entitled to look at the cautioned statement to see whether there is evidence which is not inherently improbable so as to constitute 'sufficient grounds' for the accused to be committed to the High Court (see s 139(i) of the CPC which says '... and to take all such evidence as may be produced in support thereof and such other evidence as the magistrate may think fit to call for.') The presiding magistrate did just that and she rightly considered the cautioned statement in its correct perspective. H

In the cautioned statement, the accused stated that there was direct confrontation between his neighbours numbering seven to eight persons with his mother. Abusive words were used by the neighbours, aimed specifically at his mother. The accused's father interceded to end the quarrel. This angered the deceased who, armed with a knife, tried to stab I

A the accused's father. On seeing this, the accused swiftly reacted by pushing his father aside thereby avoiding the attack. The deceased then turned the knife at the accused, bent on stabbing the latter. Fortunately the accused managed to grab Ravi (the deceased's son) and used him as a shield. The deceased accidentally stabbed his own son (Ravi) in the course of the scuffle with the accused. The accused quickly grabbed the hand of the B deceased (who was at that time still holding onto the knife), turned the knife towards the abdomen of the deceased and stabbed him. The pathologist in his evidence did not state that the wound was sufficient in the ordinary course of nature to cause death. However, the pathologist was emphatic in that the weapon used was a knife.

C The witnesses for the prosecution, especially deponents no 1, 2 and 3 were interested witnesses. They gave perjured evidence in the preliminary inquiry especially deponent no 1. The evidence adduced must be taken in its totality and cannot be taken out of its context. I am of the considered view that on the evidence presented by the prosecution, the presiding magistrate in the preliminary inquiry was right to rule that there is insufficient D evidence to constitute the ingredients of murder under s 302 of the Code, an offence under the purview of the High Court.

The presiding magistrate towards the conclusion of the preliminary inquiry made the following order:

E Setelah mendengar dan meneliti semua keterangan yang dikemukakan oleh pendakwa dan setelah mendengar hujah-hujah pihak pendakwa dan pembela, mahkamah mendapati tidak terdapat alasan-alasan yang mencukupi (sufficient grounds) untuk memerintahkan YKT dihantar untuk dibicara di Mahkamah Tinggi.

Walau bagaimanapun, mahkamah mendapati terdapat elemen-elemen yang diperlukan untuk menuduh YKT di bawah s 304 Kanun Keseksaan.

F Dengan itu mahkamah sekarang meminda pertuduhan terhadap YKT daripada tuduhan di bawah s 302 Kanun Keseksaan kepada s 304 Kanun Keseksaan dan memerintahkan dipindahkan ke Mahkamah Sesyen, Kuala Kangsar untuk sebutan.

It is apparent from the order of the presiding magistrate that by preferring G a charge under s 304 of the Code and having it transferred to the Sessions Court, Kuala Kangsar, the presiding magistrate was exercising her powers under s 140(i)(b) of the CPC. Section 140(i)(b) of the CPC reads thus: '... order the accused to be tried before some other Magistrate.'

Now, as stated earlier by virtue of s 100 of the Subordinate Courts Act H 1948, the presidents of the sessions courts (now judges) may conduct preliminary inquiries. Since in this revision the magistrate conducted the preliminary inquiry it is no bar for her to transfer the case to the Sessions Court, Kuala Kangsar under s 177 of the CPC as the punishment in s 304 of the Code clearly falls within the jurisdiction of the sessions court (see s 63 Subordinate Courts Act 1948).

I The order of the presiding magistrate in the preliminary inquiry appears to be supported by the case of *Re Osman bin Abdullah*[8] where Bellamy J said:

When all the evidence has been taken, the magistrate's duty simply is to inquire, has a prima facie case been made out against the accused by credible evidence?

If the answer to this question is in the affirmative, then the magistrate is bound to commit the accused for trial. On the other hand, if the answer is in the negative, the magistrate is bound to discharge the accused, *unless the evidence discloses an offence over which he has jurisdiction in which case he may either deal it himself or order it to be tried by another magistrate.* (Emphasis added.)

In the final analysis, having perused the record of the proceedings in the preliminary inquiry, I am satisfied that there are no valid grounds for me to disturb the presiding magistrate's order and accordingly I affirm the said order and direct the accused to appear before the Sessions Court, Kuala Kangsar on 27 April 1993 on a charge under s 304 of the Penal Code.

Order accordingly.

Reported by Aslam Zainuddin